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No. 9, Original

In the Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS,
MISSISSIPPI, ALABAMA
AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

EXCEPTIONS AND BRIEF OF THE STATE OF MISSISSIPPI

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No. 9, Original

In the Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.
(Mississippi Boundary Case),
Defendants.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF MISSISSIPPI

The State of Mississippi excepts to the Report of the Special Master with respect to the following findings and recommended rulings:

1. That the western portion of Mississippi's coastline is the low water lines along East Ship and West Ship Islands, Cat Island, and Isle Au Pitre together with the intervening straight lines marking the limits of Mississippi Sound.

2. That no part of Chandeleur Sound constitutes inland waters of the State of Mississippi.

3. That the United States has not applied the method of straight baselines for delimiting the waters of Chandeleur Sound.

4. That the United States may recognize Chandeleur Sound as inland waters for "domestic" purposes while adopting a different coastline for international purposes.

5. That the Geneva Convention on the Territorial Sea and Contiguous Zone (1964), 15 U.S.T. (pt.2) 1607, T.I.A.S. No. 5639 was not adopted by the Court as the exclusive definition of "inland waters" or as a limit on a state's territory under the Submerged Lands Act, 43 U.S.C. §1301-1315.

6. That the Master failed to make any findings respecting the geographic extent of Chandeleur Sound.

Instead, the State of Mississippi urges the Court to fix the coastline of the State of Mississippi along the barriers islands from Dauphin Island to the easternmost extension of East Ship Island and thence on a line from the easternmost tip of East Ship Island to the Northern tip of the Chandeleur Islands to the Mississippi-Louisiana boundary as defined by coordinate points in Mississippi's proposed decree.

SUMMARY OF ARGUMENT

1. This case was filed in 1978 to resolve a dispute involving the status of the waters of Mississippi Sound. It later became clear that the location of Mississippi's coastline would also require a determination of the status of Chandeleur Sound for Mississippi Sound and Chandeleur Sound are adjoining bodies of water lying at right angles to each other. They are separated from each other by Cat Island, and East and West Ship Islands. The Northern tip of the Chandeleur Islands lies almost due South of the easternmost extension of East Ship Island. Portions of Chandeleur Sound have previously been recognized by

the United States as inland waters. *United States v. Louisiana, et al.*, 422 U.S. 13 (1975); *United States v. California*, 381 U.S. 139, 171 (1965). Indeed, the United States has conceded before the Special Master its willingness to treat part of the Sound as inland waters of Mississippi for "domestic purposes." Further, the record is replete with evidence that Chandeleur Sound has traditionally been recognized as inland waters of Louisiana and Mississippi. This Court took note of the ten-mile rule previously employed by the United States to enclose water areas between the mainland and fringing islands as inland waters. *United States v. Louisiana, et al.*, 470 U.S. 93, 106, 107 (1985).

The Submerged Lands Act, 43 U.S.C. §1301, *et seq.* defines the term "coastline" as the "line of ordinary low tide which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Consequently the shore of islands or mainland which lies on inland waters, *i.e.* within the baseline for measuring the territorial sea, has no role in coastline delimitation; only that part of the coast along the open sea may be incorporated into the coastline. If Chandeleur Sound is inland water it will determine the location of the western portion of Mississippi's coastline.

2. The United States has previously recognized portions of Chandeleur Sound as inland water under various formulations, *e.g.* ten-mile rule and fictitious bay. These formulations were pointed out in *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. by both parties as an example of state practice for incorporating waters between offshore islands and the mainland or other islands as internal waters. The Geneva Convention on the Territorial Sea and Contiguous Zone sanctioned the use of straight baselines for delimiting internal waters. It in no way re-

quired the United States to renounce its practice, rather it was permissive and served to recognize the use of the straight baselines method. In the *United States v. California, supra,* the United States distinguished its treatment of Chandeleur Sound by noting that it was fully consistent with the ten-mile rule. Likewise, the Court in *United States v. Louisiana, et al.,* 394 U.S. 11, 72, observed that the fictitious bay concept was merely the result of the application of the straight baseline method to a string of islands. Under these circumstances it is submitted that the concession proffered by the United States reflects its firm and continuing policy of adhering to its past international policy of using straight baselines to incorporate areas between offshore islands and the mainland or other islands as inland offshore islands and the mainland or other islands as inland waters.

The Supreme Court entered its decree in the Louisiana case, 422 U.S. 13, in 1975 defining as internal waters the waters west of the agreed line with the State of Louisiana.

The Government in its litigation with the states has disclaimed its former policies and practices of using straight baselines in Chandeleur Sound. It has offered to enter into the same stipulation with Mississippi as it did with Louisiana in 1971. However, not only are the geographic facts changed, but this Court has repeatedly recognized the desirability of a single coastline for both international affairs and the adjudication of Submerged Lands Act claims. The offer of a stipulation and unilateral concession for domestic purposes only are not only contrary to the intent of this Court in adopting the Convention for the Submerged Lands Act cases but cause absurd and intolerable results such as high seas within state boundaries and state jurisdiction.

Finally, the Master concluded that Chandeleur Sound can be internal waters of the State of Mississippi only by employing straight baselines or by stipulation of the parties.

Mississippi submits that the parties may not agree to do by stipulation that which is contrary to the terms of the congressional grant under the Submerged Lands Act and the definitions of inland waters adopted by the Court. In the state's view the definition of inland waters provided by the Convention are the exclusive means of establishing a state's claim to inland waters. A concession or stipulation by the parties which abjures the terms congressional grant would sanction a gift of territory to the states apart from the Submerged Lands Act and exceed the original jurisdiction of the Court. See: *Vermont v. New York*, 417 U.S. 270, 277 (1974). The concession or offer of stipulation by the United States, like the one with Louisiana, simply reflects the adherence to a former practice of employing straight baselines for Chandeleur Sound.

3. Where a fringe of islands are found along the coast, Article 4 of the Convention permits the use of the method of straight baselines joining appropriate points. Mississippi contends that in view of the United States' reliance upon the ten-mile rule, fictitious bay theory, or straight baselines, the Government may object to the proposal closing line only if the points selected are unreasonable or inappropriate under international law. Indeed, the Court has previously indicated its unwillingness to allow the United States to abandon its international stance to gain advantage in a lawsuit. It observed that despite the deference accorded to the executive branch in its international relations, "a contraction of a state's

recognizing territory imposed by the Federal Government in the name of foreign policy would be highly questionable." 381 U.S. 139, 168. Prior to the Court's ruling in *United States v. California, supra,* the United States actually defined its boundaries in accordance with the principles and methods embodied in Article 4 of the Convention. Not until that decision did the United States retreat from its reliance on the straight baseline method. Its stipulation with Louisiana in 1971 and concession to Mississippi reaffirm the straight baseline approach of the ten-mile rule or fictitious bay formulations. Failure to recognize the use of straight baselines for Chandeleur Sound would divest Mississippi of long recognized territory.

ARGUMENT

Introduction

The Special Master in his previous report filed in this action, concluded that Mississippi Sound was a historic bay within the meaning of Article 7, Section 6 of the Geneva Convention on the Territorial Sea and Contiguous Zone [1964], 15 U.S.T. (pt.2) 1607, I.I.A.S. No. 5639 (hereafter referred to as the Convention). See Report of Special Master dated April 9, 1984. The Court approved and directed the parties to submit proposed appropriate decrees for the Master's consideration and recommendation. The State of Mississippi had argued before the Master that the use of straight baselines enclosing Mississippi and Chandeleur Sounds was fully consistent with the traditional United States' foreign policy. (Brief, Section I(A)(2) submitted June 6, 1983). The Master concluded that the United States had adopted the

24 mile closing line together with the semi-circle test in place of the ten-mile rule previously employed. He stated that this had resulted in no contraction of the recognized territory of the states in view of his finding that Mississippi Sound constituted historic inland waters. He therefore concluded that Article 4 of the Convention should not apply. The Master however failed to consider any contraction of Mississippi's territory in Chandeleur Sound. In its opinion, this Court stated:

> The two states contend that the whole of Mississippi Sound constitutes "inland waters." Under this view, the *coastline* of the States consists of the lines of ordinary low water along the southern coast of the barrier islands together with appropriate lines connecting the barrier islands. These latter lines mark the *seaward limit* of Mississippi Sound. [Emphasis supplied]. (470 U.S. at 96).

A literal reading of the language of the Court's opinion would deny Mississippi any claim to submerged lands in Chandeleur Sound beyond the three (3) mile territorial sea as measured from the barrier islands.

The parties have reached substantial agreement for defining coastline for the eastern portion of Mississippi Sound. However, serious difficulties arose as to an appropriate decree for the western portion of the Sound. Mississippi asserted that the waters of Chandeleur Sound, like those of Mississippi Sound which it joins, are inland waters and that the islands west of the easternmost extension of East Ship Island had no role in determining the seaward limit of the waters of Mississippi Sound since they were in direct contact with Chandeleur Sound which has been recognized as inland waters.

In previous litigation with Louisiana the United States stipulated that Louisiana was entitled to the submerged lands west of an agreed closing line and south of the Louisiana-Mississippi lateral boundary. The Court's decrees at 422 U.S. 13 and 452 U.S. 726 establish Louisiana's coastline along a line drawn from Ship Island to the northern tip of the Chandeleurs to the Louisiana-Mississippi boundary. It is implicit in the decrees that at least a part of Chandeleur Sound is inland waters, otherwise, the states would have no common lateral boundary in the Sound. The Master recognized part of Chandeleur Sound west agreed closing line belonged to Louisiana as inland waters. He stated:

> "As all of the waters of Chandeleur Sound lying south of Mississippi-Louisiana boundary are on the landward side of the baseline established by the decree [422 U.S. 13], they are therefore internal or inland waters."

But as to the waters to landward of baseline and north of the lateral boundary, the Master has concluded that they constitute high seas and territorial waters even though they too lie on the landward side of the same baseline line.

Both the Master and the United States agree that the waters north of the Mississippi-Louisiana boundary can be inland waters under the Convention only by the application of straight baselines.

I. The Seaward Limit of Mississippi Sound Lies Along the Barrier Islands Between Dauphin Island and the Ship Island and Lines Connecting Them.

The coastline of Mississippi Sound is complicated by the fact that the western portion of Sound is adjacent to Chandeleur Sound to the South. The two sounds are sep-

arated by Isle Au Pitre, Cat Island, and East and West Ship Islands. The status of Chandeleur Sound as either inland water or high seas has a direct bearing on the coastline delimitation of Mississippi Sound.

The Submerged Lands Act, 43 U.S.C. §1301, *et seq.*, confirms to each state title to the lands beneath navigable waters within the state's boundaries. (See §1311(a)). The Act further grants each coastal state a seaward boundary three geographical miles distant from its coastline. The term "coastline" as used in the Act is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." (See §1301(c)). The question left unresolved by the Submerged Lands Act was that of defining what constitutes "open sea" and "inland waters".

Whatever the definitions may be, it is clear that any part of the coast or shore which lies on inland waters is not in direct contact with the open sea, and has no role in coastline delimitation. Consequently, if Chandeleur Sound is inland waters, the coasts of Isle Au Pitre, Cat Island and East and West Ship Islands will not form a part of Mississippi's coastline since they would be entirely within inland waters. Neither would the lines joining the islands mark the limits of inland waters but merely serve to separate the inland waters to the north from those to the south.

II. Chandeleur Sound Constitutes Inland Waters of Mississippi and Louisiana.

In its opinion, this Court held:

> The United States continued openly to assert the inland water status of Mississippi Sound throughout

> the 20th century until 1971. Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded ten (10) geographical miles. This ten-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.
>
> . . . Nor is there any doubt, under the stipulations of the parties in this case, that Mississippi Sound constitutes inland waters under that view. (470 U.S. 106-107).

Nor is there any doubt that Chandeleur Sound constituted inland waters under that policy.

In *United States v. California*, 381 U.S. 139 (1965), the United States stated:

> California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters. For present purposes, it is enough to observe that the widest entrances to Chandeleur and Breton Sounds are six miles between Brenton Island and Bird Island and slightly less than ten miles, between Ship Island and the northernmost tip of the Chandeleur Islands. Thus, our concession as to Chandeleur and Breton Sounds involved no breach of the ten-mile limit. (Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, pp. 130-31).

The Court subsequently distinguished Santa Barbara Channel from Chandeleur Sound which it noted "the United

States claims as inland waters." 381 U.S. 139. Also see 363 U.S. 1, 66, n.108 (1960).

In the Louisiana case, the Court in its discussion of fringing islands noted that Chandeleur Sound and Breton Sound were not in dispute.

> . . . . for the United States, while not asserting that the sounds are necessarily inland waters under the Convention, has conceded that they belong to Louisiana. That concession was made at an early stage of this litigation. . .
>
> and the United States has decided not to withdraw it *despite the subsequent ratification of the Convention.* [394 U.S. 11, 67, n.87 (1969)]. [Emphasis supplied].

The United States by its decision not to withdraw its concession respecting Chandeleur Sound following the adoption of the Convention in effect confirmed its prior claims under the ten-mile rule. Any doubts of the United States' continuing recognition of Chandeleur Sound as inland waters were resolved by decree in the Louisiana case which established an agreed baseline as the coastline of Louisiana. That baseline extended from the northernmost promontory of the Chandeleur Islands to a midpoint on West Ship Island. The concession itself reflects the United States' continuing application of the ten-mile rule. In 1968 the distance between the Chandeleurs and the westernmost point of the Ship Islands no longer satisfied the requirements of the ten-mile rule.

In its brief submitted in the Louisiana case in August 1968, the United States referring to the line which represented the federal position as to the coastline of Louisiana, stated:

> The Chapman Line ran from the northernmost point of the Chandeleur Islands toward the westernmost

> point of the Ship Islands, as far as the Mississippi boundary. However, a shorter line can be drawn from the Chandeleur Islands to a more central point on the south shore of the western Ship Island. To the extent that the area is landlocked at all, it obviously is more so at the narrower crossing. Since it seems arbitrary to insist on our original crossings to the western end of the Ship Islands when a shorter crossing line can be drawn that is more favorable to Louisiana, we propose the latter line as the more practical way of rounding out our concession. (Brief for United States, p. 130).

A similar change was made for the closing line to Breton Sound due to accretions at Main Pass. These enlargements of territory were in keeping with the ten-mile rule. The distance between the new point on Ship Island and the Chandeleurs was sightly less than ten miles and thus conformed the concession to the ten-mile rule."[1]

Despite the Court's decree in the Louisiana Case, 422 U.S. 13 and 452 U.S. 726, the Special Master concluded that except for that part of Chandeleur Sound west of the agreed baseline and south of the Louisiana-

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1. Following the devastation of Hurricane Camille in 1969, Ship Island was severed into East and West Ship Islands and the distance to the nearest point on the Chandeleurs exceeded ten (10) nautical miles. (See N.O.S. Chart 11373 introduced as Exhibit 156-3). The Master, referring to the southern terminus of the closing line proposed by the United States stated:

> . . . [The northern promontory of the Chandeleur Islands has migrated eastward so that the point is no longer located upon that promontory *but in open water*. [Emphasis supplied]. (Report, p. 17).

The decreed coordinate is approximately 2/3 of a mile (1,742 feet north and 2,040 feet west) of the current promontory for the Chandeleurs. (See: 422 U.S. 13; 452 U.S. 726 and Figure 2 appended to the Report of the Special Master. Also see U.S. Exhibit 3 to Hearing of June 12, 1986)

Mississippi boundary, Chandeleur Sound was high sea and territorial waters. His analysis presumes the existence of a lateral Louisiana-Mississippi boundary in the Chandeleur Sound. Such a lateral boundary can exist only if Chandeleur Sound is inland waters.

In *United States v. Louisiana,* 394 U.S. 11 (1969) this Court referring to its duty in defining the term "inland waters" in Submerged Lands Act stated:

> It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases, and it would require a stronger showing of congressional intent than has been made in this case to justify the assumption of such unconfined power. (394 U.S. at pp. 33-34).

It is submitted that this Court in its adopting of the agreed baseline for Chandeleur Sound in the Louisiana Boundary Case (422 U.S. 13 and 457 U.S. 726) recognized a portion of Chandeleur Sound as inland waters without restriction to "domestic" purposes. That conclusion of course was consistent with the Court's desire to establish a single coastline for both domestic and international purposes by adopting the definition of inland waters provided by the Convention.

Were Chandeleur Sound not inland waters under the Submerged Lands Act and the definition provided by the Convention, the decree would have no relation to this Court's original jurisdiction or the performance of its functions under Article III.

In *Vermont v. New York,* 417 U.S. 270 (1974) the Court rejected a decree proposed by the Special Master: It stated:

> *Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law,* some drawn from the international field, some expressing a "common law" formulated over the decades by this Court.
>
> The proposals submitted to this Court might be proposals *having no relation to law.* Like the present decree they might be *mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Art. III functions.* Article III speaks of "judicial power" of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. [Emphasis supplied]. (417 U.S. at 277).

Consequently, the Court approval of the decree was limited by the Congressional grant and its recognition of Constitutional powers. Implicit in the Court's decision is the conclusion that the portion of Chandeleur Sound subject to the decree does in fact constitute inland waters.

In the present circumstance, any concession or stipulation of the parties would be ineffective in light of the Master's findings and recommendation that Chandeleur Sound is not inland waters.

Approval of the Special Master's Supplemental Report would not only have an unsettling effect upon long recognized rights of the parties and their lessees but would as the Court noted "give the same statute wholly different meanings in different cases." Likewise, merely because Louisiana and the United States have negotiated a baseline for Chandeleur Sound should not be permitted to prejudice the determination of Mississippi's coastline pursuant to Article III of the Constitution of the United

States. The concession for "domestic purposes" proposed by the United States would deny Mississippi the opportunity to establish the extent of its claim and at the same time exceed the jurisdiction of the Court. Nevertheless, the concession is further evidence of the United States' long-standing use of straight baseline for Chandeleur Sound.

III. The United States Has Employed Straight Baselines in Chandeleur Sound.

The Submerged Lands Act, 43 U.S.C. §1301, *et seq.*, confirms to each state title to the lands beneath navigable waters within the state's boundaries. See §1311(a). The Act further grants each coastal state a seaward boundary three geographical miles distant from its coastline. The term "coastline" as used in the Act is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." See §1301(c). The question left unresolved by the Submerged Lands Act was that of defining what constitutes "open sea" and "inland waters".

In *United States v. California*, 381 U.S. 139 (1965), this court adopted the best and most workable definitions available for giving content to the words of the Act. It held:

> The Convention on the Territorial Sea Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of Submerged Lands Act. This establishes *a single coastline for both the administration of the submerged Lands Act and the conduct of our future international relations.* [Emphasis supplied]. (381 U.S. at 165).

Article 4 of the Convention permits a nation to employ straight baselines in delimiting its coastline. It provides in pertinent part:

> In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The Court concluded that the choice under the Convention to use the straight baseline for delimiting inland waters is one that rests with the Federal Government, and not the individual state. *United States v. Louisiana*, 470 U.S. 93, 99 (1985); *United States v. California*, 381 U.S. 139, 168 (1965). In the California case, the Court indicated that there may be limits on the deference accorded the United States' disclaimer of straight baselines. In this respect the Court stated:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus, a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. (381 U.S. at 168).

Similarly, the Court in the Louisiana decision further cautioned:

> The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in United States v. California, it would be inequitable in adopting the principles of international law to the resolution of a

> domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. (394 U.S. at 77).[2]

It further admonished:

> It is one thing to say that the United States should not be required to take the *novel, affirmative step of adding to its territory by drawing straight baselines.* It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic law suit. The latter, we believe would approach an impermissible contraction of territory against which we cautioned in United States v. California. [Emphasis supplied]. (394 U.S. at 77).

The Court left it to the Special Master to consider the practice of the United States.

The Court further indicated that the Federal Government's discretion under Article 4 of the Convention was not absolute. It noted:

> It might be argued that the United States' concession [that Chandeleur Sound was inland water of the State of Louisiana] reflected its firm and continuing policy to enclose inland waters within island fringes. It is

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2. The Court suggested "the only fair way" to apply the Convention was to consider a historic claim as if it were being made by a national sovereign and opposed by another nation. As to straight baselines, the same test should be applied to determine whether a practice of the United States constitutes a straight baseline method. In this respect, both Norway and the United Kingdom cited the United States' use of the ten-mile rule both as authority for straight baselines and a limitation on their use. *Fisheries Case*, I.C.J. (1951)

not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have in effect, utilized the straight baseline approach sanctioned by Article 4 of the convention. If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. . . . We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States has actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and Contiguous Zone. (394 U.S. at 72, n.97).

In his earlier report dated April 9, 1984, Special Master Armstrong concluded as to Mississippi Sound there was no contraction of recognized territory of the states and therefore Article 4 did not apply. (Report, p. 7). However, as to Chandeleur Sound, he stated:

> That was my conclusion as to Mississippi Sound, but as to the waters lying south of Mississippi Sound and north of Chandeleur Sound, I reach the opposite conclusion. The line which the United States proposes appears to be clearly a straight baseline within the scope of the definition [of Article 4] quoted above. There is a deep indentation in the coastline, and there is a group of Islands (East and West Ship Islands, Cat Island, Isle Au Pitre) in its immediate vicinity. It seems appropriate that the Federal Government should choose to adopt this method of delimiting inland waters in this particular locality. (Draft Report, pp. 28-30 attached as Exhibit A).

The Master concluded that Chandeleur Sound could be inland waters under the Convention only by the application of straight baselines or by an agreement of the parties. He considered the unilateral concession sufficient proof of a straight baseline method to warrant a finding that the United States had employed straight baselines in Chandeleur Sound. This conclusion is hardly surprising in view of the fact that the United States' reliance on the ten-mile rule was the publicly stated policy of the United States for well over half a century. (470 U.S. at 106-107).

The United States objected to the Master's findings and disclaimed any reliance on straight baselines. The Government declared:

> The United States *has never asserted a straight baseline anywhere* along its coast, and cannot consistently with its stance on the applicable international law accept this rationale for the purposed decree. (Memorandum of United States dated January 27, 1987; also see Report, p. 26).

The Master in his subsequent draft deleted his reference to the United States' concession as an adoption of a straight baseline.

The Master concluded that the proposed concession of the United States could nevertheless be given effect by the Court to the same extent as a stipulation could be given effect. The Master stated:

> . . . [I]n the absence of the specific adoption of a straight baseline by appropriate authority, it must be my conclusion as to the waters lying south of Mississippi Sound and north of Chandeleur Sound. However, the line which the United States proposes

> appears to me to achieve the same result by other means. If the United States is willing to concede that the southern and eastern boundary line of the State of Mississippi lies further seaward than the Court has held, then I see no reason why it should not be free to do so. And if the Court approves, by its opinion foreign nations would be put on notice thereof just as they were of the stipulated line between the United States and Louisiana (United States v. Louisiana, *supra*, 84 L.Ed.2d at p. 85) and no doubt the line would thereafter be clearly indicated on charts to which due publicity would be given. (Second Draft Report, pp. 29-30, attached as Exhibit B).

The Master did not consider the long-standing practice of the United States of employing the ten-mile or fictitious bay rule as evidence of use of straight baselines (470 U.S. at 106-107) neither did he find the concessions by the United States (452 U.S. 726; 422 U.S. 13; 394 U.S. 11, 66, n.87; 381 U.S. 139, 171; and 363 U.S. 1, 66-67, n.108) evidence of a straight baseline method. He appears to have accepted the United States' disclaimer that it had never employed straight baselines at any time or any place as conclusive.

Any question that the United States' treatment of Chandeleur Sound is the result of applying straight baselines is resolved by a letter dated June 6, 1972 by Jonathan I. Charney, Chief of the Marine Resources Section of the Justice Department and member of the Intra-Agency Baseline Committee. He wrote:

> Although the State Department takes the position that Chandeleur Sound is for the most part high seas, in the early part of our litigation with Louisiana the Department of Justice took the position that it

> was internal waters on the theory that it was a *fictitious bay*. (See Exhibit M-101). [Emphasis supplied].

In *United States v. Louisiana*, 394 U.S. 11 (1969), the Court noted:

> [W]e held that the choice of whether to employ the concept of a "fictitious bay" was that of the Federal Government alone [citation omitted]. That holding was, of course, consistent with the conclusion that the drawing of straight baselines is left to the Federal Government, *for a "fictitious bay" is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast.* (p. 72, n.96).

The term fictitious bay and ten-mile rule are employed interchangeably for the same concept of enclosing waters between offshore islands and the mainland or other islands as internal waters. Moreover, as this Court has held, the United States employed the ten-mile rule at least from the time of Alaska Boundary Arbitration in 1903 to the ratification of the Convention. Since that time, the United States has ratified that policy by a series of concessions and stipulations which recognize Chandeleur Sound as inland waters. This Court has reached the same conclusion in its decrees in the Louisiana case. (422 U.S. 13; 452 U.S. 726).

In that Report, he reversed his recommendation as to Chandeleur Sound and rejected both the concession by the United States based on Louisiana line and the line proposed by the State of Mississippi. He concluded that Chandeleur Sound could be inland waters only by the

adoption of straight baselines and that the United States' disclaimer was absolutely dispositive of the issue. He also declined to consider whether Chandeleur Sound had been recognized as inland waters under United States' prior practice. He recommended the coastline for western portion of Mississippi Sound be established along the coasts of the East and West Ship Islands, Cat Island, Isle Au Pitre, and the Intervening lines joining the islands. He reached this conclusion despite his finding that such a coastline "would raise the same problems as Mississippi's proposed line at the ambulatory boundary between Mississippi and Louisiana". (Report, p. 24).

It is evident that failure of the Court to find Chandeleur Sound constitutes inland waters will result in the loss of recognized territory of the State of Mississippi.[3]

The contraction of a state's recognized territory was one of the limitations the Court placed on its deference to the articulated Federal position on straight baselines. Another factor was whether by permitting the state to assert a claim to inland waters under Article 4 of the Convention would require the United States to take the novel, affirmative step of adding to its territory by the use of straight baselines. In the matter *sub judice*, the use of straight baselines for Chandeleur Sound would not require the United States to take a new or novel action, for it has employed a form of straight baselines since 1903 as noted by this Court. Indeed, under those formulations, Chandeleur Sound would have constituted inland waters.

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3. In his letter of October 17, 1951 referred to in note 11 of the Court's latest opinion, Secretary of Interior Chapman recognized a portion of Chandeleur Sound as inland waters of the State of Mississippi. (See joint Exhibit 64; also see Report, p. 20; 470 U.S. 93, 109, n.11).

In his final Report, the Master stated:

> The question then is whether the proposed concession by the United States can nevertheless be given effect. In my opinion, this could be done only if the line proposed by the United States amounts to an adoption of a straight baseline. (Report, pp. 24-25).

This Court in its decree in the Louisiana case approved the identical line for Louisiana. The effect of that decree can hardly be viewed by foreign nations as anything less than a recognition of the United States' reliance on straight baselines. Likewise, the Court's recent recognition of the policy of the Federal Government in adhering to the ten-mile rule for over half a century would further confirm that practice.

The United States has attempted to distort and deny effect to the very policies which are at the heart of all of its concession to Chandeleur Sound. Following the entry of the Supplemental Decree in the Louisiana case (422 U.S. at 13) which established the line now proposed by the United States as the baseline for Chandeleur Sound, the United States issued navigational charts for the Chandeleur Sound depicting the limit of the territorial sea and closing lines for inland waters. (See Joint Exhibit 156-3). It is surprising that the United States approved charts which show the entirety of Chandeleur Sound as high seas or territorial seas. Not only is this contrary to the Court's decree, but is inconsistent to the very reason of adopting the Convention, *i.e.* for establishing a *single* coastline for both the conduct of our international relations and the administration of the Submerged Lands Act. The position of the Government is further confused by the *Notice to Marines*, a pamphlet published by the National Oceanic and Atmospheric Administration for use with N.O.S.

nautical charts. These charts are approved by the Ad Hoc Committee on Delimitation of the United States Coastline more commonly known as the Baseline Committee. The notice provided in conjunction with Charts 11373 and 11363 provides:

> TERRITORIAL SEA BOUNDARIES OFF COASTS OF LOUISIANA.
>
> The lines indicating the seaward boundary of the territorial sea on charts depicting waters off the coast of Louisiana do not necessarily coincide with the limit of the State's jurisdiction under the Submerged Land's Act, including fisheries regulation.
>
> Notably, on Charts 11363 and 11373 the indicated line of the territorial sea is not the limit of the State's jurisdiction. In the area of Chandeleur and Breton Sounds, Louisiana's jurisdiction, including fisheries regulation, extends to all waters on its side of the Louisiana-Mississippi boundary and landward of a line beginning approximately at the center of Ship Island to the northernmost point on the Chandeleur Islands. . . . (See Joint Exhibit 90, attached as Exhibit C).

Statements and Charts such as these are a clear attempt by the United States to renounce its use of the ten-mile rule to gain advantage in a domestic lawsuit with the States.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully submits that the Supplemental Report of the Special Master should be disapproved insofar as it recommends defining the western portion of "Mississippi seaward boundary[4] as lying along the seaward coasts of West Ship Island and Cat Island and the straight line connecting the two to the Mississippi-Louisiana boundary between Cat Island and Isle Au Pitre.

The State of Mississippi further submits the Supplemental Report be disapproved insofar as it finds the United States has not employed straight baselines for Chandeleur Sound and the Sound is high seas north of the Mississippi-Louisiana boundary.

Instead the State of Mississippi urges the Court to enter its order (1) fixing the eastern coastline of the States of Alabama and Mississippi from Dauphin Island to Ship Island to the extent agreed upon by the parties, (2) finding Chandeleur Sound to be inland waters of the States of Mississippi and Louisiana, (3) declaring the western coastline of the State of Mississippi as lying along a straight line between Ship Island and the northernmost tip of the Chandeleur Islands to the Mississippi-Louisiana boundary, (4) and directing the parties to prepare and submit to the Special Master a proposed decree defining the limit of Chandeleur Sound by a baseline joining appropriate points on Ship Island and the

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4. The Master apparently mistakes the terms "boundary" and "coastline" as synonymous. The Submerged Lands Act, 43 U.S.C. §1301, *et seq.* grants coastal states a boundary three (3) miles from their coastlines.

northernmost tip of the Chandeleur Islands for consideration by this Court.

Respectfully submitted,

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wise be a part of the territorial sea and not inland waters; namely, those between the closing line of Chandeleur Sound and the proposed line of the United States fixing the seaward boundary of Mississippi. In the case of Louisiana, a similar relinquishment was accomplished by stipulation between the parties, which the Court adopted; but here, as previously noted, Mississippi has declined to enter into any such stipulation. The effect of such a concession would be to give Mississippi jurisdiction over more inland water than it would otherwise have under a literal interpretation of the Court's opinion. As the United States says in its Post-Hearing Brief:

> [T]he extent of the Chandeleur Sound was not involved in this suit over the status of Mississippi Sound. In the United States' view, the appropriate delimitation of Mississippi Sound would utilize closing lines between the fringing islands, as suggested by the Special Master:
>
> > Along the southern cost of Ship Island westward to the point on that island nearest to Cat Island; thence in the shortest possible straight line to the nearest point on the eastward coast of Cat Island; thence along the southern coast of Cat Island to its western extremity; thence along a straight line from that point to the nearest adjacent point on Isle Au Pitre to a point where that line intersects the thalweg of the Pearl River. Such a decree would effectuate the opinion of the Supreme Court and resolve all issues litigated in this case. (at p. 2)

This would, however, raise the same problem as Mississippi's proposed line at the ambulatory boundary between Mississippi

nd Louisiana. In an effort to avoid this problem, the United tates made the following offer:

> We have never previously conceded that any portion of the Chandeleur Sound should be treated as inland waters of Mississippi. Nevertheless, in the interest of judicial economy and facilitation of this decree, the United States is willing to make the same stipulation as to Mississippi as was made to Louisiana: for domestic purposes, the portion of the northern Chandeleur Sound on the Mississippi side of the Mississippi/Louisiana lateral boundary will be treated as inland waters of Mississippi. (United States Pre-Hearing Brief, at p. 6)

This offer was rejected by Mississippi. The question hen is whether the United States can achieve the same purpose nilaterally. I think that it can. In its most recent opinion n this case, the Court says:

> Article 4 of the Convention permits a nation to employ the method of straight baselines in delimiting its coastline. Article 4(1) provides in pertinent part:
>
> > "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."
>
> The Court has held, however, that the method of straight baselines is applicable only if the Federal Government has chosen to adopt it. (Citation of authorities omitted) In the present case, the Special Master concluded that the United States has not adopted the straight baseline method. (84 L.Ed2d at p. 29)

That was my conclusion as to Mississippi Sound; but as to he waters lying south of Mississippi Sound and north of

Chandeleur Sound, I reach the opposite conclusion. The line which the United States proposes appears to me to be clearly a straight base line[15] within the scope of the definition quoted above.[16] There is a deep indentation in the coastline, and there is a group of Islands (East and West Ship Islands, Cat Island, Isle Au Pitre) in its immediate vicinity. It seems appropriate that the Federal Government should choose to adopt this method of delimiting inland waters in this particular

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[15]Although some authorities refer to a "system" rather than a "method" of straight baselines (see 1 Shalowitz 30), the Court in United States v. California, supra (381 U.S. at pp. 167-68) seems to recognize that the method of straight base lines may be applied to one part of the coast but not to another. In United States v. Louisiana, supra, referring to the Chandeleur Islands and the Isles Dernieres, the Court says:

> The position of the United States is that such island chains can be taken into account as enclosing inland waters only by drawing straight baselines; (394 U.S. at p. 67).

Consistency would seem to require that the United States take the same position in the instant case.

[16]See the Court's discussion at United States v. California, supra, 381 U.S. at pp. 167-169; United States v. Louisiana, supra, 394 U.S. at pp. 72-73. In the latter case the Court says that "this optional method of establishing boundaries should be left to the branches of government responsible for the formulation and implementation of foreign policy."; but no question was raised as to the right of the Solicitor General to enter into on behalf of the United States the stipulation of January 21, 1971, and the Court approved the stipulation by its decree of June 16, 1975.

locality.[17] And if the Court approves, by its opinion froeign nations would be put on notice thereof (United States v. Louisiana, supra, 84 L.Ed.2d at p. 85) and no doubt the line would thereafter be clearly indicated on charts to which due publicity would be given, as required by Article 4, Section 6 of the Covenant.

Mississippi however cannot claim a similar right under the Convention to support its proposed seaward line. As the Court says in United States v. California, supra:

> But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States. (381 U.S. at p. 168)

RECOMMENDATION

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[17] It is significant that the offer of concession of the United States quoted above is "for domestic purposes." Article 5, Sec. 2 of the Covenant provides:

> Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

The United States submits that the closing lines defining Mississippi Sound as to Mississippi and Alabama should be between the fringing islands of the Sound from Dauphin Island to Isle au Pitre, or alternatively should be identical (as defined in the accompanying form or decree) as far westward as West Ship Island and then southward along the Louisiana decree line to the lateral boundary with Louisiana. (Post-Hearing Brief of the United States at pp. 16-17). Obviously, the Court has such an option; but my charge as Special Master is not to pose alternatives but to make recommendations. I therefore recommend that for the reasons stated above the Court enter the decree tendered by the United States with one modification only. The United States is apparently willing to bear one-half of the additional costs incurred by the Special Master since the Court's opinion of February 26, 1985; but it seems inequitable that the state of Alabama should be charged with one-half of the balance as the proposed decree provides. I therefore recommend that these costs be shared equally between the United States and the state of Mississippi.

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wise be a part of the territorial sea and not inland waters; namely, those between the closing line of Chandeleur Sound and the proposed line of the United States fixing the seaward boundary of Mississippi. In the case of Louisiana, a similar relinquishment was accomplished by stipulation between the parties, which the Court adopted; but here, as previously noted, Mississippi has declined to enter into any such stipulation. The question therefore is whether such a result can be effected unilaterally.

The proposed concession would give Mississippi jurisdiction over more inland water than it would otherwise have under a literal interpretation of the Court's opinion. As the United States says in its Post-Hearing Brief:

> [T]he extent of the Chandeleur Sound was not involved in this suit over the status of Mississippi Sound. In the United States' view, the appropriate delimitation of Mississippi Sound would utilize closing lines between the fringing islands, as suggested by the Special Master:
>
> > Along the southern cost of Ship Island westward to the point on that island nearest to Cat Island; thence in the shortest possible straight line to the nearest point on the eastward coast of Cat Island; thence along the southern coast of Cat Island to its western extremity; thence along a straight line from that point to the nearest adjacent point on Isle Au Pitre to a point where that line intersects the thalweg of the Pearl River. Such a decree would effectuate the opinion of the Supreme Court and resolve all issues litigated in this case. (at p. 2)

This would, however, raise the same problem as Mississippi's proposed line at the ambulatory boundary between Mississippi and Louisiana. In an effort to avoid this problem, the United States made the following offer:

> We have never previously conceded that any portion of the Chandeleur Sound should be treated as inland waters of Mississippi. Nevertheless, in the interest of judicial economy and facilitation of this decree, the United States is willing to make the same stipulation as to Mississippi as was made to Louisiana: for domestic purposes, the portion of the northern Chandeleur Sound on the Mississippi side of the Mississippi/Louisiana lateral boundary will be treated as inland waters of Mississippi. (United States Pre-Hearing Brief, at p. 6)

This offer was rejected by Mississippi. The question then is whether the proposed concession of the United States can nevertheless be given effect by the Court. I think that it can to the same extent that a stipulation between the parties could be given similar effect. The effect of doing so would benefit Mississippi by giving it jurisdiction over more inland water than it would otherwise have under a literal interpretation of the Court's opinion. Therefore it can hardly complain.

In its most recent opinion in this case, the Court says:

> Article 4 of the Convention permits a nation to employ the method of straight baselines in delimiting its coastline. Article 4(1) provides in pertinent part:

> "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."
>
> The Court has held, however, that the method of straight baselines is applicable only if the Federal Government has chosen to adopt it. (Citation of authorities omitted) In the present case, the Special Master concluded that the United States has not adopted the straight baseline method. (84 L.Ed2d at p. 29)

That was my conclusion as to Mississippi Sound; and, in the absence of the specific adoption of a straight base line by appropriate authority, it must be my conclusion as to the waters lying south of Mississippi Sound and north of Chandeleur Sound.[15] However, the line which the United States proposes appears to me to achieve the same result by other means. If the United States is willing to concede that the southern and eastern boundary line of the State of Mississippi lies further seaward that the Court has held, then I see no reason why it should not be free to do so. And if the Court approves, by its opinion foreign nations would be put on notice thereof just as they were of the stipulated line between the United States and

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[15]See the Court's discussion at United States v. California, supra, 381 U.S. at pp. 167-169; United States v. Louisiana, supra, 394 U.S. at pp. 72-73. In the latter case the Court says that "this optional method of establishing boundaries should be left to the branches of government responsible for the formulation and implementation of foreign policy." See U.S. Memorandum dated January 27, 1987.

Louisiana (United States v. Louisiana, supra, 84 L.Ed.2d at p. 85) and no doubt the line would thereafter be clearly indicated on charts to which due publicity would be given.

Mississippi however cannot claim a similar right in support of its proposed seaward line. As the Court says in United States v. California, supra:

> But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. (381 U.S. at p. 168)

RECOMMENDATION

The United States submits that the closing lines defining Mississippi Sound as to Mississippi and Alabama should be between the fringing islands of the Sound from Dauphin Island to Isle au Pitre, or alternatively should be identical (as defined in the accompanying form of decree) as far westward as West Ship Island and then southward along the Louisiana decree line to the lateral boundary with Louisiana. (Post-Hearing Brief of the United States at pp. 16-17). Obviously, the Court has such an option; but my charge as Special Master is not to pose alternatives but to make recommendations. I therefore recommend that for the reasons stated above the Court enter the

decree tendered by the United States with one modification only. The United States is apparently willing to bear one-half of the additional costs incurred by the Special Master since the Court's opinion of February 26, 1985; but it seems inequitable that the state of Alabama should be charged with one-half of the balance as the proposed decree provides. I therefore recommend that these costs be shared equally between the United States and the state of Mississippi.

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[ftnts:WPA]

EXHIBIT C

NOTICE TO MARINERS

(47) TERRITORIAL SEA BOUNDARY OFF COAST OF LOUISIANA.

The lines indicating the seaward boundary of the territorial sea on charts depicting waters off the coast of Louisiana do not necessarily coincide with the limit of the State's jurisdiction under the Submerged Lands Act, including fisheries regulation.

Notably, on Charts No. 11363 and 11373 the indicated line of the territorial sea is not the limit of the State's jurisdiction. In the area of Chandeleur and Breton Sounds, Louisiana's jurisdiction, including fisheries regulation, extends to all waters on its side of the Louisiana-Mississippi boundary and landward of a line beginning approximately at the center of Ship Island to the northernmost point on the Chandeleur Islands, following the low water line along the seaward shore of those islands, then to Grande Gosier Island, Breton Island, and finally to the mainland at Main Pass; and also all waters on the Louisiana side of the Mississippi-Louisiana boundary and within a belt 3 geographical miles seaward of the lines just described.

Charts 11351, 22nd Ed 1/20/80
11356, 20th Ed 1/26/80
11357, 20th Ed 1/19/80
11358, 29th Ed 8/9/80
11361, 43rd Ed 8/9/80
11363, 20th Ed 1/12/80
11371, 22nd Ed 4/19/80
11373, 25th Ed 6/28/80

Supersedes N.M. 1(47)80)

(NOS, Rockville, MD; RS6265/80)